No. 12039

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellant,

vs.

JOHN McCORD and FLORENCE McCORD,

Appellees.

APPELLEES' BRIEF.

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Facts.

With as few material facts in issue as are here involved, it is amazing that appellant could draw therefrom the inferences and make the innuendoes which appear throughout his brief. Perhaps it is understandable that appellant's personnel, being constantly so exposed in the nature of their work, should become unduly biased and prejudiced in their attitude toward their opponents. Fortunately, as in the instant case, the court is not swayed by, nor does it have preconceived concepts of persons such as appellees. Little need be added to the Court's own observation [R. 105] that appellees committed no fraud, are not guilty of concealment, and that they conducted themselves in a manner which they believed to be proper [R. 104], and further that appellees acted reasonably and

in good faith in seeking advice in the matter of registering their property [R. 104]. It is only because of the slant given to the very few material facts that appellees are called upon to controvert and take issue with the statement of facts as appears in appellant's brief.

The McCords as lessees acquired the master lease on the Belmont Apartment Hotel on July 1, 1941, and immediately began to operate it as a hotel [R. 132]. The name included "hotel" and hotel services were rendered [R. 76] long before rent control became a fact. There was no change in the conduct of the establishment in the nature of services from the time of acquisition until the sale of the lease on April 1, 1946 [R. 84]. The McCords did not personally operate the establishment. They had a manager who was in active charge of the hotel [R. 65]. On or about September 1, 1943, the McCords moved to Hemet, California [R. 83, 85], and remained in Hemet until they moved to Ontario, California on or about March 1, 1945 [R. 83].

These facts were known to appellant on July 7, 1944 when the McCords filed two supplemental registrations [R. 115, 116] with OPA, indicating the McCord address in Hemet, California. The change of mailing address to Hemet was recognized by the OPA by its letter of October 20, 1944 [R. 131, 133]. Notwithstanding that fact, the OPA addressed and mailed its subsequent letters to the McCords in Los Angeles [R. 119, 125, 126, 127, 128, 129, 130]. It is not contested that the letters were mailed, but it has been denied and refuted that some of the letters were received and that others were not received promptly, as it appears that during this period of time, and for some three years prior to the hearing in Court in

February, 1948, Mr. McCord had been ill and was ill on the day of the trial. He had been in and out of the hospital some five times [R. 82]; that sometimes the mail was forwarded [R. 83], and sometimes Mr. McCord or Mrs. McCord would be in Los Angeles and pick up the mail [R. 86, 88, 89]. This accounts for much of the delay that may have been entailed since the initial letter of July 12, 1944 [R. 132].

Appellant has made considerable issue in his brief concerning the dilatory tactics of the McCords, but this obviously did not impress the Court since the Court found there was no fraud or concealment and viewed the continuous negotiations as an ordinary matter of business [R. 105]. An examination of the letters will indicate that much took place between the several letters [Plaintiff's Exhibit 3], which appellant, in footnote 6 on page 4 of his brief, describes as unsuccessful attempts to elicit information, in that the fact is that after McCord's letter of July 12, 1944 [R. 132], the initial request by the OPA is dated October 20, 1944 [R. 131], and from reading the next letter from OPA dated December 6, 1944, it is apparent that there had been a response to the October 20, 1944 letter, and that certain specific information was requested in the nature of a chart, which information particularly referred to occupancy during the months of June, September and October of 1942, and November of 1944. The next letter from OPA of January 2, 1945 [R. 129], indicates that a chart, as requested, for June, September and October, 1942, and November, 1944, had been furnished, but that now the request was for a chart for January of 1945 [R. 128, 129]. The OPA, on May 10, 1945 [R. 126], had received the chart requested, but by

now had asked for additional information covering the month of April, 1945. And McCord's letter of June 5, 1945 [R. 144] indicates by its nature that the letters of May 26, 1945 [R. 125] had just been received.

It was this careful examination by the Court of Plaintiff's Exhibit 3, consisting of the series of letters, which undoubtedly prompted the Court to refer to the negotiations as an "ordinary matter" [R. 105]. It is obvious from an examination of Plaintiff's Exhibit 3—the series of letters—that in response to each of the letters a chart was submitted as requested, but that in each successive letter information for a different month was requested by the OPA. That this is not unusual, the Court could almost take judicial notice, in view of the problems that landlords had with OPA and OPA had with landlords not understanding each other about what information was wanted and furnished. Nowhere in the series of letters [Plaintiff's Exhibit 3] is there any indication that the OPA considered the registration improper but, as stated by counsel, OPA apparently accepted the initial letter as a petition of some nature.

The uncertainty of the nature of the establishment is best demonstrated by the reference of appellant's counsel to it as a "hotel" [R. 75]. The fact that subsequently the McCords chose to register on another OPA form is not an admission that its original registration was wrong, but is a common and quite understandable reaction in following the line of least resistance. Even this registration

had to be filed twice before it was acceptable to the OPA [R. 84], all of which caused further passage of time.

While the matter of proceeding for an injunction does not appear in the evidence and should not therefore properly be before this Court, appellant has taken the liberty of calling it to the Court's attention, based on the opening statement of his counsel [R. 31], and has concluded therefore, as a result of the suit, that the McCords re-register (App. Br. p. 5). As long as counsel has taken this liberty, may we invite the Court's attention to the explanation given by Mrs. McCord of why such suit was necessary, that the McCords acted under the advice of counsel that the inspection of all other books and records be made in pursuance to some judicial authority [R. 40]. (See also Appellant's Memorandum for Trial, Paragraph III), and upon said filing the McCords did forthwith comply.

The Court was aware of these proceedings and apparently did not consider the conduct heinous on the part of the McCords [R. 104, 105]. The Court did observe that while the Government had a right to assume that the registrations were honest, it also pointed out that the McCords knew not one form from the other, and necessarily had to rely on the advice of appellant's office and personnel and found that such conduct was not objectionable [R. 104]. It further appears that in the original registration the McCords did not ask for any specific form but made very clear the nature of their establishment and how it was conducted, and that the OPA personnel actu-

ally suggested and selected the form upon which the McCords were to register [R. 79, 80]. While it is true that the courts have held that the Government could not be estopped by reason of the oral advice of its employees, it is nevertheless a pertinent fact for the consideration of the Court, in determining whether or not the Court should exercise its chancery powers as herein requested. If there had been any question of improper conduct on the part of the McCords, the injunction suit filed in December, 1945 [R. 31], not only would have contained the demand for registration, but also charges of overcharge, if any. Since the action was dismissed with prejudice (Appellant's Memorandum for Trial, Paragraph III, p. 5, line 22), it should be self-evident that the Rent Director concluded no wrong had been committed by the McCords. This alone should preclude the present action.

In December, 1945, the McCords could have protected themselves by obtaining a refund of income taxes paid on the income from 1942 to 1945. This was no longer available to them, because of the statute of limitations, when the OPA chose to file its action on March 22, 1947, and the time that necessarily elapsed before trial and the determination thereof in February, 1948. It is extremely difficult to follow appellant's theory of referring to the McCords "procrastination" and that the McCords "prevented the early institution of suit" (App. Br. pp. 20 and 21). The Court was not so persuaded [R. 104, 105]. The opportunity of the McCords to adjust their costs or be relieved of hardship by rent revision of course long were passed and particularly on April 1, 1946.

ARGUMENT.

The Sole Issue Before This Court Is the Question of Whether the Trial Court Abused Its Discretion in Not Ordering Restitution of Alleged Overcharges.

(a) That the Court ordinarily has the power of restitution under Section 205a of the Act and as set forth in *Porter v. Warner Holding Co.*, 328 U. S. 395, is not *per se* debatable and was not an issue before the Court. The Court acknowledged that, and stated that it had such powers [R. 95]. The Court further set forth that in the instant matter, since the McCords were no longer owners of the property, no injunction was necessary or proper, nor would any be granted [R. 95].

(b) It had been held in *Porter v. Black and Sherwood Distilling Co.*, 156 F. 2d 264, that since injunctions deal primarily with future threatened violations and not past violations that an injunction should not be employed to punish past violations or to establish that violations have occurred. Following this decision, an application for a rehearing was made by the Administrator, based on *Porter v. Warner Holding Co., supra*, on the theory that the court had such power under the language of *Porter v. Warner Holding Co.* The Circuit Court, upon rehearing, pointed out that the cases were distinguishable, in that in the *Black* case the court had no power to issue the injunction since the facts were all in the past and none were being threatened, and therefore there was no basis for the injunction, and consequently there could be no incidental relief of restitution. However, this principle involving the right of restitution was not an issue in the case because the matter turned on the propriety of the exercise of the court's traditional chancery powers.

(c) A further point was made by appellant that the United States is not bound by the statute of limitations or by laches. There is no question but that in the Act, Section 205e, Congress specifically limited the right of recovery for the tenants, and this statute of limitations for treble damages is binding on the United States, as well as other individuals. That part of the Court's finding which specifically found [R. 44] that the statute of limitations barred the action under 925e, refers to that portion of appellant's pleadings [R. 234], in which appellant sets forth its action was under 205e and asked for relief in the nature of treble damages thereunder. That the Court also was cognizant of and understood the general rule that the doctrine of laches could not be exerted against the United States, is noted by the Court's statement that "I am aware that the Government is not barred by any statute of limitations" [R. 102]. The Court, in referring to "laches" did refer to the tenants in the matter of being derelict [R. 105]. While it may be accepted as a general rule that the statute of limitations and the doctrine of laches cannot be exerted against the United States in its sovereign capacity, that the rule is subject to the exceptions, which the Congress and the Court itself has indicated brings the United States, by statute or otherwise, within the doctrine specifically. For example, in *Utah Power & Light v. United States*, 243 U. S. 389, at 409, the Court repeated the general rule that laches and the statute of limitations are not a defense against the Government, but that this might be subject to exceptions. There have been several decisions, particularly involving rent cases, in which our Courts have referred to laches as a valid doctrine. The point is not really in issue but for the sake of clarifying the principles involved and

the theory of the Court, it is to be noted that there is respectable authority for the proposition that laches may be considered in these types of cases. (*Blood v. Fleming,* 161 F. 2d 292, at 296; *Woods v. Winters,* 171 F. 2d 759; *Porter v. Warner Holding Co.,* 328 U. S. 395 at 396; *Creedon v. Randolph,* 165 F. 2d 918 at 919; *Wall v. Brim,* 145 F. 2d 492.)

In *Woods v. Winters,* 171 F. 2d 759, which was decided December 31, 1948, the Court pointed out that the exercise of the chancery powers was in its sound discretion, and particularly said that

> "the doctrine of laches applies to an application for an injunction or other order to force compliance with Section 4 of said Act, as amended (50 U. S. C. A. Appendix 904)."

Appellant has quoted the case of *Wood v. Stone,* 333 U. S. 472, as authority to the contrary, and the Court's attention is respectfully invited to the fact that in that case neither laches nor Section 205a was involved.

Be that as it may, while the doctrine of laches itself is not an issue upon which the instant case turned, it was part of the evidence before the Court, which the Court was justified in considering in the exercise of its discretion as to whether the Court should grant equitable relief within its chancery powers.

(d) The sole question before the trial court, and which this Court must decide, is whether the trial court abused its discretion by refusing to grant equitable relief in the instant case. It is obvious that the Court realized that this was the only issue before it, as it twice called counsel's attention to the singular issue before it [R. 95, 103].

It is true, in the case of *Creedon v. Randolph,* 165 F. 2d 918, the Circuit Court of Appeals remanded that case to the District Court, with instructions to exercise its discretion. In that case the Court pointed out that the landlord apparently did not testify nor did the appellee landlord participate in the appeal or even appear; that it was tried primarily by the Court as a default matter and under those circumstances the District Court's action in refusing to exercise its discretion might have been an abuse, and therefore reversed and remanded the case, with instructions to exercise the discretion that belonged to it. This ruling did not direct the District Court to find against the defendant, but simply that it should act and it was an abuse not to exercise its discretion. It is submitted here that the District Court did exercise its discretion and determined that the instant case was not one in which the chancery powers should be granted.

It is inescapable from reading the Court's opinion which is found in R. 95, 96 and 102-106; that the Court considered all of the factors before it, the conduct and the attitude of the McCords, the good faith in which they proceeded [R. 104] and the fact that there was no fraud or concealment of their operations [R. 105]; that they ran this establishment as a hotel under the belief that it was such [R. 104]; that it was they who initiated and raised the dubious question rather than any complaint to or proceeding by appellant [R. 105]; that by virtue of the change of conditions and the position of the McCords they were irreparably injured and that it would be inequitable to order any reimbursement [R. 105, 106]. These factors all added up to cause the Court to decide not to exercise its chancery powers. It was simply a case

which did not appeal to the conscience of the Chancellor. There was no abuse of discretion therein, and there is sufficient evidence to substantiate these findings and the exercised discretion of the Court. It is interesting to note that even in those cases which are cited by appellant for its authority, throughout them runs the vein that the Court must decide each case according to the necessities of that case. As is said in *Hecht v. Bowles*, 321 U. S. 321, and *Porter v. Warner Holding Co.*, 328 U. S. 395, 398, "power of the chancellor to do equity and to mold each decree to the necessities of the particular case." The Court had before it the McCords, all of the documents, the exhibits, the registrations; it had the opportunity to observe the demeanor of the McCords, the interests involved, and from all that was before it, including the pleadings, the Court justifiably decided that there was no fraud, no concealment, and a case of fair and proper conduct on the part of the McCords. Therefore the Court's findings of fact therein should not be disturbed. From these facts the Court's decision is sound and justified. It is true that there might have been a mistake, but it has never been decided yet whether the Belmont Apartment Hotel is or is not a hotel within the meaning of the Act, and the mere acquiescence on the part of the McCords in following the line of least resistance in reregistering does not change the situation or indicate any reason for ordering restitution. It is true that the McCords did compromise and otherwise dispose of several claims [R. 66], but this, too, was in the nature of following the line of least resistance and following a course of conduct which is economically sound. It is not, as stated by appellant (Br. pp. 6 and 7) that the claims were fully admitted therein.

The Court's attention is respectfully invited to *Columbia Gas v. United States,* 151 F. 2d 461, in which the defenses were raised that equity relief should not be granted because the appellants had not come into Court with clean hands, and that the applicants themselves were guilty of violating many of the equitable principles which must exist before relief could be granted to them. The Court in that case pointed out that equity would not police enforcement of laws, nor apply to every unconscionable act, nor was it an avenger of those wronged; that while the general doctrines of the basis for the right of equitable relief must prevail, notwithstanding a digression from those principles, equity itself would not, as it stated "be an avenger." So, in the instant case, if the McCords have by any act been wrong, notwithstanding that, equity should still proceed to exercise its powers in such manner as is just and proper in the premises.

Conclusion.

The judgment should be sustained. This Circuit Court of Appeals should find that the District Court acted properly and did not abuse its discretion in refusing to exercise its chancery powers in denying relief to appellant under the pleadings in the case and the evidence produced at the trial.

Respectfully submitted,

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